State of California
GOVERNOR'S OFFICE
SACRAMENTO, CA 95814

GEORGE DEUKMEJIAN
GOVERNOR

TELE
(916) 4

February 25, 1986

D. E. Cannon, D.C.
Tahoe Chiropractic Clinic
P.O. Box 14487
South Lake Tahoe, CA 95702

Dear Dr. Cannon:

I am acknowledging receipt of your letter dated February 12, 1986, regarding Doctors Hermauer and McKown.

The matter is under review by this office in accordance with your request.

Sincerely,

G. H. Vasquez

GADDI H. VASQUEZ
Deputy Appointments Secretary

rec 3-27-86

TAHOE CHIROPRACTIC CLINIC
P.O. BOX 4487
SOUTH LAKE TAHOE, CALIF. 95702
541-5660

2-12-86

State of California
Governor's Office
Sacramento, California 95814

ATTN: Mr. Gaddi Vosquez:

Dear Mr. Vosquez:

I am writing because of my great concern regarding the improper appointments of several members of our California Chiropractic Board of Examiners specifically doctors Hemauer and McKown.

In 1984 Dr. George Weiner wrote to your office and filed a complaint against these same doctors. The information was given to the Attorney Generals ofc. to be processed. (please find attached Exh. "A") a copy of the response from the AG's office. Also attached is a copy of your letter to Dr. Weiner in response to his complaint (Exh. "B".)

Please find enclosed a eight page document showing why these doctors are illegal with their position on the State Board and the reasons why steps should be taken at this time to correct the situation. Also all chiropractors on our State Board are from the same State Association (which Exh. "C" will show you to be illegal.)

My final statement that I would like to make regarding these doctors and others associated with them on the board, is that they are being sued by several doctors and groups in Federal Court in Los Angeles under the "RICO" actions for conspiracy and racketeering. "Yet", while these court cases are progressing these same doctors are using their position on the State Board to file charges against and to harass the doctors that have filed lawsuits against them. (A DIRECT CONFLICT OF INTEREST).

We would certainly like to know what the Governor is going to do about the corruption and discrimination and illegal position that these board members are employing.

Look forward to hearing from you on this issue very soon.

Sincerely,

D. E. Cannon, D.C.

State of California Department of Justice

Memorandum

To : Diana Marshall
Deputy Appointments Secretary
Office of the Governor
State Capitol
Sacramento, CA 95814

Date : October 2, 1984

File No.:

Telephone: ATSS (8) 454-5463
(916) 324-5463

From : Faith J. Geoghegan, Deputy Attorney General
Office of the Attorney General—Sacramento

Subject : Qualification for Members of the Board of Chiropractic Examiners

This is in response to your request of September 20, 1984, regarding the qualifications of Dr. Hemauer and Dr. McKown to serve on the Board of Chiropractic Examiners.

After reviewing the information received from you and from officials at the Los Angeles College of Chiropractic, it is our informal advice that the activities of both Drs. Hemauer and McKown do not disqualify them from serving on the Board.

Neither doctor has been a paid employee, an administrator nor a policy board member within one year of his proposed appointment, pursuant to the terms of the Chiropractic Act (California Business & Professions Code Appendix, §§ 1000-1001).

Neither Dr. McKown's nor Dr. Hemauer's membership on the advisory board for the post-graduate Industrial Relations course constitutes a "policy boardmember" position because, we are assured, such members have no authority to set policy for the school. Any honorarium received by Dr. Hemauer for lectures he has given is not considered to render him a paid employee of the college, but merely is an hourly fee paid to him as an independent contractor for providing post-graduate relicensing course lectures around the state. Dr. McKown's assistance in developing a portion of the post-graduate curriculum does not bring him within the proscriptions of the Chiropractic Act in that he was neither paid nor considered an employee of the college.

Consequently, it appears to us that neither man is ineligible for Board membership based on the facts given for our consideration.

Please contact me at the above-listed telephone number if you have any questions.

EXH
A

State of California
GOVERNOR'S OFFICE
SACRAMENTO, CA 95814

GEORGE DEUKMEJIAN
GOVERNOR

916/445-4541

EXH
B.

October 10, 1984

George Weiner, D.C.
3611 East Century Blvd.
Suite 8
Lynwood, California 90262

Dear Dr. Weiner:

Thank you for your letter of September 24, 1984, where you again bring to our attention the appointment of John D. Hemauer, D.C. to the Board of Chiropractic Examiners. We have had this matter thoroughly researched by the Attorney General's Office. I have enclosed for your review a memo to myself from the Deputy Attorney General who was assigned to this matter.

As the attached memo indicates, the Attorney General's Office has concluded that Dr. Hemauer's appointment to the Board was not improper. You may notice there are references to a Dr. McKown, we also asked the Attorney General's Office to look into his status as he is a potential appointee to this board.

We consider the Attorney General's Office opinion dispositive of this matter. If you have any further comments that you would like to make please don't hesitate to correspond with me.

Sincerely,

Diana Marshall

Diana Marshall
Deputy Appointments
Secretary

"dangerous drugs and solutions including human urine." The D.O. is reported to have first prescribed a drug that resulted in a weight gain of thirty-three pounds in five weeks. His "cure" was to "inject her with her own urine". According to the article the patient became infected at the injection site and required surgery to close the wound. The newspaper advises that neither physician could be reached for comment.

This case is certainly interesting and reinforces the time-honored legal principle that "anyone can sue anyone for anything". The strange facts, straining credulity and the union of the unfortunate D.C. with this rather unorthodox D.O. presents what must seem an unimaginable scenario. Notwithstanding that, similarly improbable suits are filed daily against D.C.s and other medical providers throughout the country.

The AMICUS will, of course, make every effort to keep up with the case and report its subsequent history to you, but the matters reported here are taken from the newspaper, and not directly from the case. It is the nature of our judicial system, however, that this case may be settled or pursued to some

EXH

"C"

STATE BOARD: UNCONSTITUTIONAL SELECTION

The Supreme Court of South Carolina has held that state's statutory framework for selection of members to its Board of Medical Examiners violative of the State Constitution. In Toussaint v. State Board of Medical Examiners, 329 S.E. 2d 433 (1985) the court held that the State Medical Association's submission of a list of names from which the governor appointed the Board, together with eligibility for appointment conditioned upon membership in the State Association, delegated the power of appointment to the Association. Such delegation was held void since the Constitution vests all such legislative power in the General Assembly.

The board appointment procedure struck down in this case is similar to that found in many other jurisdictions for selection to disciplinary boards, boards of examiners and other license-monitoring agencies.

Similar constitutional questions also arise in those states having more than one Chiropractic association and in which the governor's appointments are made from nominations of the numerically dominant association. While this holding is only directly applicable to the statutory framework in which it is set, the arguments found persuasive here are well considered and any framework under which association membership is required and a single association dominates board appointments is suspect at best.

NOTES FROM THE EDITORS

Just as earlier issues of the AMICUS have had dominant themes such as Compensation cases or last month's Medicare/Medicaid emphasis, this month we have concentrated upon malpractice cases. While a number of these cases do not involve Chiropractors as parties, the facts involved and principles applied have equal application to Chiropractic. In future issues we intend to address thermography, writing reports, depositions and expert testimony. We encourage your submission of topic suggestions and feed-back upon what features of the AMICUS you have found of most and least interest and use.

We would like to express our gratitude to all of our readers and subscribers who have assisted us by sending in cases, articles, comments and concerns. Many of the articles which have appeared in the AMICUS would not have been available for comment or not available as quickly without this additional source of information. In our continuing effort to provide materials on the most timely possible basis, we specifically ask that you advise of any opinions (whether or not published) affecting litigation you are involved in or of which you are aware. Additionally, we wish to keep you apprised of new suits being filed in an attempt to identify developing trends. Consequently we ask that you advise of any suits being filed or now pending by or against chiropractors.

Please tell us when sending in materials if you have any objection to being identified in the AMICUS as the source of information. We will, of course, honor any request for confidentiality.

EXH "D"

QUESTION: IS THE APPOINTMENT OF DR. JOHN HEMAUER LEGAL?

Recently, an objection to the appointment of John Hemauer, D. C. to the State Board of Chiropractic Examiners was challenged because that appointment was in violation of Section 1 of the Chiropractic Act, which reads in pertinent part:

> .....And no person who is or within one year of the proposed appointment has been an administrator, policy board member, or paid employee of any chiropractic school or college shall be eligible to appointment to the board.....(Deering's Business and Professions Code, Appendix I, Section 1)

The governor's office responded that Dr. Hemauer is an independant contractor and therefore is immune to this challenge.

This decision by the governor's office brings up three very interesting questions:

1. Is an independant contractor immune from Section 1 of the Chiropractic Act?
2. Is Dr. Hemauer really an independant contractor within the definitions given in the federal statutes?
3. Why did the governor's office refuse to discuss Dr. Hemauer's position as a policy board member?

IS AN INDEPENDANT CONTRACTOR IMMUNE FROM SECTION 1 OF THE CHIROPRACTIC ACT?

Section 1, as pointed out above, disqualifies anyone who is a "paid employee"; however, the governor's office has decided that an independant contractor is not a paid employee for the purposes of the Chiropractic Act.

Of interest here is Section 16 of the Chiropractic Act, which states in pertinent part:

> .....nor shall this act be construed so as to discriminate against any particular school of chiropractic.....(Deering's Business and Professions Code, Appendix I, Section 16)

The intent of this statement is obvious on its face. First, there are at least several schools, or disciplines, or followings, of chiropractic. Most of the chiropractic colleges embrace one or two of these schools; however, no college embraces all of the schools.

Secondly, the language of the Act is written in general terms so as not to "discriminate against any particular school of chiropractic".

If we were to assume that the governor's opinion is correct, it would certainly be an easy matter for a chiropractic college, attempting to have the influance of its particular school of practice, to have its paid employees, in the guise of independant contractors, sit on the board.

On the other hand, it is our contention that the meaning of "paid employee", as used in the Act, refers to anyone who is working for a chiropractic college.

To assume that a person who receives a portion of his livlihood from a chiropractic college would make a clear cut, impartial decision, should he be appointed to the board, is not the argument that will save the day.

All presumptions should go in favor of the statute. (Shivell v. Municipal Court of Santa Ana-Orange, 188 C.A.2d 333,335-337)

An employee is "a person employed." (Black's Law Dictionary, Revised Fourth Edition, page 616)

> That which can be made certain by simple reference to the dictionary is certain.(Cozad v. Board of Chiropractic Examiners, 183 C.A.2d 249,250.257,258)
>
> The words of a statute unless they have a technical meaning are to be interpreted according to their common acceptation and will be read and understood in their natural, ordinary, and plain sense. (Barron v. Board of Dental Examiners, 109 C.A. 382,385)
>
> Where language is plain and unambiguous, there exists no room for construction. (Lockhart v. Wolden, 17 C.2d 628,630-632)
>
> Where the language of a constitutional or statutory provision is susceptible of more that one meaning, it is the duty of the courts to accept that intended by the framers of the legislation, so far as such intent can be ascertained. (Gage v. Jordan, 23 C.2d 794,795,800,808,811)

To understand the intent of the framers, let us look to the Act as it was drafted at the time of its passage:

> Section 1. .....And no person connected with any chiropractic school or college

> shall be eligible to appointment as a member of the board. (Amendments to Constitution and Proposed Statutes with Arguments Respecting Same, Tuesday, November 7, 1922, page 88 (California Voter's Pamphlet))

In 1972, the people of the State of California passed an amendment to Section 1 of the Act, which is the current wording, as shown at the beginning of this article; and, it disqualifies from appointment a "paid employee", among others. (Proposed Amendments to Constitution, Propositions and Proposed Laws Together with Arguments, Tuesday, June 6, 1972, page 8 (California Voter's Pamphlet))
The Argument in Favor of the initiative amendment stated:

> A "yes" vote on this amendment to the Chiropractic Initiative Act will further insure the protection and well-being of the public by imposing additional requirements for appointment to the State Board of Chiropractic Examiners (emphasis added).
> Greater protection to the public will result from a "yes" vote by the following changes:
>
> preventing conflicts of interest by eliminating as eligible appointees to the Board of Examiners, chiropractors recently employed as administrators, policy board members or paid employees of chiropractic schools or colleges;
>
> .....A "yes" vote is supported by both the California Chiropractic Association and the International Chiropractic Association of California. (Proposed Amendments to Constitution, Propositions and Proposed Laws Together with Arguments, Tuesday, June 6, 1972, page 19(California Voter's Pamphlet))

It is obvious, then, that the addition of this amendment to the Act was for additional requirements, greater protection of the public, and preventing conflicts of interest.

The Chiropractic Act, then, tells us that anyone who works for a chiropractic college and receives pay from that college, is ineligible for appointment if he had been so employed within the preceding year.

If the framers of the Act wished to exclude an independant contractor from this exclusionary clause, it would not have been an unconscienable burden to have added it at the time of the amendment.

IS DR. HEMAUER REALLY AN INDEPENDANT CONTRACTOR WITHIN THE DEFINITIONS GIVEN IN THE FEDERAL STATUTES

While the question of whether or not Dr. Hemauer is an independant contractor is mute in connection with the Chiropractic Act, the importance of this issue is such that a discussion is necessary.

The most common reason for claiming an employer-employee relationship as that of an independant contractor is to defraud, whether intentionally or through ignorance, the Internal Revenue Service; therefore, there are statutes that guide an individual in order to help him make the correct choice.

In Weiner v. Commissioner, T.C. 1984-220, the court said:

> Whether an individual is an employee or an independant contractor is a question of fact. Some of the factors to consider in determining the individual's status are the degree of control over the individual, the individual's investment in the facilities, the permanency of the relationship between the parties, and the individual skill required. The presence or absence of any one factor is not determinative; however the degree of control is the single most crucial element. The degree of control means the right to direct the individual, not only as to the result to be accomplished, but also in the manner and means by which that result is accomplished. (Citations)

The income tax regulations advise that a doctor of chiropractic is not engaged in carrying on a trade or business with respect to the performance of service in the exercise of his profession. (26 U.S.C.A., 1402(c); U.S. Code Congressional, 1.1402(c)-6) In order for an individual to have net earnings from self-employment, he must carry on a trade or business. (26 U.S.C.A., 1402(c); U.S. Code Congressional, 1.1402(c)-1) "The name by which the remuneration for employment is designated is immaterial." (26 U.S.C.A., 3121(a)-1(c))

> Services performed after 1954 within the United States by an employee for his employer, unless specifically excepted by Section 3121(b), constitute employment. (26 U.S.C.A., 3121(b)-3(b))
>
> Section 3121(d) contains three separate and independant tests for determining who are employees. (26 U.S.C.A., 3121(d)-1(a)(2))
>
> (c) Common law employees. (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

> (2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independant contractor. (26 U.S.C.A., 3121(d)-1(a)(5)(c)(1)&(2))

In Bartels v. Birmingham, 67 S.Ct. 1547, the court said, "in the application of social legislation employees are those who as a matter of economic reality are dependant upon the business to which they render service."

In 1948, Congress passed a joint resolution (62 Stat 438), called the Status Quo Resolution, which, incidently was introduced by Representative Gearhart of California. The United States Supreme Court said "that by this resolution, Congress unequivocally tied the coverage of these tax provisions to the body of decisional law defining the employer-employee relationship in various occupations." (U. S. v. Webb, 90 S.Ct. 850)
The economic reality tests that are often used to determine employer-employee relationships, are as follows:

1. Right to control
2. Distinct trade or business
3. Skill or training required
4. Supplier of tools and/or place of work
5. Length of employment
6. Method of payment
7. Opportunity for profit or loss
8. Employee-type benefits
9. Belief of parties
10. Right to change job or site

11. Existance of contract underlying relationship

For a complete discussion of this topic, refer to 37 ALR Fed. 95, 116-147.

The Chiropractic Act is specific in defining chiropractic colleges:

> 4. Powers of board
> Powers of board. The board shall have power:
> .....
> (f) To determine minimum requirements for teachers in chiropractic schools and colleges.
> (g) To approve chiropractic schools and colleges whose graduates may apply for licenses in this state. The following shall be eligible for approval:
> (1) Any chiropractic school or college having status with the accrediting agency and meeting the requirements of Section 5 of this act and the rules and regulations adopted by the board. (Deering's Business and Professions Code, Appendix I, Section 4(f)&(g)(1))

The State Board of Chiropractic Examiners explains the degree of control that an approved chiropractic college has over a member of its faculty:

> No school shall be provisionally approved until it shall present competent evidence of its organizational and financial ability to attain the minimal educational requirements set forth by these rules and institutional goals set forth in its application. (16 C.A.C., Title 16, Article 4, Section 331.1(b))
>
> (a)Every approved school shall be under the supervision of a full time president, dean, or other executive officer who shall carry out the objective and program of the school. Said officer shall have a minimum of two years experience in school administration prior to his appointment, or its equivalent in training.
> (b) The president, dean, or other executive officer shall render a report annually, covering topics such as student enrollment, number and changes in faculty and administration, changes in the curriculum, courses given, and the projections for future policy. Said annual report shall be filed with the Board within one month following the end of the academic year.
> (c) It shall be the duty of the president, dean, or other executive officer to obtain from each faculty

member, prior to the beginning of the semester or school year, an outline and time schedule for each subject of the course. He shall approve such outline and determine from time to time if they are being observed. A copy of this outline and a schedule of classes, showing the day and hour of presentation and the instructor shall be filed with the Board within three (3) weeks after the beginning of the term.
(d) The dean shall maintain a record of the teaching load of each member of the staff in terms of classes taught, supervision, student counselling, committee work, and other assigned activities.
(e) A permanent file of all class schedules, beginning with those as of the date of the school's approval shall be maintained by the dean. These shall be available for inspection and comparison with the courses described in the relative catalogs.
(f) Schedules must be kept up to date and posted on a bulletin board available for student inspection.
(16 C.A.C., Title 16, Article 4, Section 331.3(a)(b)(c)(d)(e)(f))

331.10 Faculty Organization.
(a) A faculty shall be organized by departments. Regularly scheduled meetings of the full faculty shall be had to provide a free exchange of ideas concerning:
(1) The content and scope of the curriculum;
(2) The teaching methods and facilities;
(3) Student discipline, welfare and awards;
(4) Faculty discipline and welfare;
(5) Committee reports and recommendations;
(6) Recommendations for the promotion and graduation of students;
(7) Administration and educational policies; and
(8) Recommendations to the administrative officers and to the trustees.
(b) The dean shall appoint the following standing committees of which he shall be a member ex officio: admissions and credentials, curriculum, clinic, laboratories, library and examinations, grades and records.
(16 C.A.C., Title 16, Article 4, Section 331.10(a)(b))

The rules and regulations then advise what happens, sho the chiropractic college fail to abide by the rules:

331.15. Violations or Failure to Comply.
(a) Any violation of these rules, or failure to

> comply with them, shall be grounds to revoke approval of any school, and to refuse approval to any school, or to any applicant. (16 C.A.C., Title 16, Article 4, Section 331.15(a))

The control that the chiropractic colleges must have on each member of its faculty is, by law, total. Since no honestly run chiropractic college would risk having its approval from the Board revoked, it follows that each member of the faculty fits into the definition of employee, as defined by Congress (62 Stat 438 (1948)); and, also, each member of the faculty of a chiropractic college would easily pass the economic reality test as an employee.

Adherance to the argument that Dr. Hemauer is an independant contractor, merely jeopoardizes that particular chiropractic college with the Internal Revenue Service.

WHY DID THE GOVERNOR'S OFFICE REFUSE TO DISCUSS DR. HEMAUER'S POSITION AS A POLICY BOARD MEMBER?

The catalog for Los Angeles College of Chiropractic clearly states that Dr. Hemauer is a member of "Chiro Collegium", an organization that assists the Board of Regents in, among other things, making policy for the college.

Further, as pointed out in the State Board Rules and Regulations, each faculty member must take an active part in the policy decisions of the college or the college will have its Board approval revoked. (16 C.A.C., Title 16, Article 4, Section 331.10 & Section 331.15(a))

A position that advises that Dr. Hemauer is not a policy board member is untenable.

CONCLUSION

1. Dr. Hemauer should be removed from his appointment to the Board as he is a paid employee, as defined in Section 1 of the Chiropractic Act.

2. Dr. Hemauer is not an independant contractor as provided within the regulations of the Internal Revenue Service.

3. Dr. Hemauer is a policy board member, as defined in Section 1 of the Chiropractic Act.

ACTION REQUESTED

Remove Dr. Hemauer from his appointment to the Board of Chiropractic Examiners and replace him with an eligible appointee.